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ALEXANDER L. STEVAS,
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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1983

DAVID DUNCAN,

Petitioner,

vs.

HUNTINGTON PARK REDEVELOPMENT AGENCY, a Body Politic,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the United States.

BRUCE E. CLARK,
523 West Sixth Street,
Suite 400,
Los Angeles, Calif. 90014,
(213) 622-7116,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented for Review.

1. Does the proposed taking of petitioner's property by respondent for the private use of an adjacent property owner violate the due process of law clauses of the Fifth and Fourteenth Amendments?

2. Was petitioner denied procedural due process because of the lack of fundamental fairness in the exercise of power by respondent to acquire petitioner's property?

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JUDGMENT AND OPINION BELOW.

The judgment of the trial court, rendered in the Superior Court of California, County of Los Angeles, which confirmed petitioner's right to retain his property, is attached hereto as Appendix "A" and the findings of fact and conclusions of law with respect thereto are attached hereto as Appendix "B". The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, which reversed the trial court and denied petitioner's right to retain his property, is attached hereto as Appendix "C". Petitioner's petition for rehearing in the Court of Appeal was denied by the opinion for publication and modification of opinion and is attached hereto as Appendix "D". Petitioner's timely petition for hearing in the California Supreme Court was denied without opinion on May 18, 1983, which denial is attached hereto as Appendix "E."

JURISDICTION.

The Judgment of the trial court was entered January 5, 1981. The decision of the Court of Appeal was filed March 22, 1983. Petitioner's timely petition for hearing before the California Supreme Court was denied on May 18, 1983. This petition for writ of certiorari is filed within ninety days of said latter date. This Court's jurisdiction is invoked under 23 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment to the United States Constitution.

> ". . ., nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Fourteenth Amendment to the United States Constitution.

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

In 1965, petitioner Duncan relocated his industrial hardware business on an improved leased site fronting on Slauson Avenue in Huntington Park, California.

In 1975, Duncan acquired the fee and an adjacent lot for future expansion and has continued the business to date.

In 1972, Huntington Park organized a Redevelopment Agency. Each member of the City Council became a member of the Agency. In this dual capacity, a project for the development of a part of downtown Huntington Park was adopted.

In 1977, the Agency adopted a second project known as the Huntington Park Industrial Redevelopment Project consisting of 200 acres of industrial property within the city

limits, which included the Duncan property and the next door business neighbors, the Spitzers. While this area included older industrial properties which were in need of repair and renovation, neither Spitzers' nor Duncan's property was in any way deficient.

The stated purpose of the plan for this industrial redevelopment was to ". . . eliminate and prevent the spread of blight and deterioration in the project area . . ." No housing was contemplated.

In the three years following the adoption of the Industrial Redevelopment Project, the total redevelopment effort consisted of the following only:

1. The execution of an agreement by the Agency with the SPITZERS to acquire .31 acre of the Duncan property for the Spitzers' private use at the Spitzers' sole expense.

2. The taking of Duncan's property for the Spitzers by lending the use of the Agency's sovereign right of eminent domain, including the California Government Code franking privilege for court filing.

3. The vacation of a portion of an alley or street at the east end of the project.

The trial court found that the taking was not for a public purpose and dismissed the Agency's action.

The California Court of Appeal reversed and held that there was no basis for judicial review since Duncan "failed to demonstrate a lack of substantial evidence to support the Agency's findings in the Resolution of Necessity. The California Court of Appeal went on to state that

> "the Agency's selection of the Spitzers' proposal was well within the bounds of discretion and was based on factors consistent with the Agency's mandate to 'prevent the spread of blight and deterioration.' "

REASONS FOR GRANTING THE WRIT.

Petitioner Has Been Deprived of His Constitutional Rights as a Property Owner Under the Pretext That His Property Is Being Taken for a Public Purpose.

It has been repeatedly established that eminent domain is an inherent attribute of sovereignty upon which constitutional guaranties merely place two limitations. Aside from just compensation, the only other justiciable issue is the question of public purpose or public use.

All other questions regarding the taking of private property are legislative in nature and foreclose further exception other than under state statutory law.

The narrow view of what constituted "Public Use or Purpose" at the turn of the century has been expanded to include a wide spectrum of slum clearance and community rejuvenation projects, but the constitutional limitations have not changed.

State legislation has spawned the formation of Redevelopment Agencies in virtually every city in California, many with multiple projects. The aggressive activity of some of the Agency directors has repeatedly crossed the line of constitutional limitation. Because of the position of public officials with the backing of legal and administrative staff, legislative authority and sheer intimidation, private property owners are constantly facing difficult tests.

The line of constitutional limitation must be fluid as concepts develop, but it must at all times be discernible.

This constitutional limitation on the awesome power of eminent domain as well as a definition of the extent of its legitimate use is definitively set forth in the leading case of *Schneider v. District of Columbia*, 117 F.Supp. 705 (U.S.D.C. (District of Columbia) 1953). This 1953 case sets forth the constitutional concepts and limitations relative

to the exercise of the sovereign right of eminent domain and gives substance to the expanded concept of public use or public purpose. At the same time, this decision warns of the inherent danger to fundamental rights.

The Court stated, at page 716:

> "These extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights. The reasoning upon the point begins with the basic concept of natural rights and of property as one of those rights. To secure those rights governments were instituted, says the Declaration, and to secure them governments may impose limitations upon them; moreover, by clear implication the Fifth Amendment authorized the taking of private property for public use. But here is the end of government power. That the Government may do whatever it deems to be for the good of the people is not a principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited. There is no general power in government, in the American concept, to seize private property. Hence it is universally held that the taking of private property of one person for the private use of another violates the due process of law clause of the Fifth and Fourteenth Amendments. The reasoning which applies to this right is the same as that which applies to other rights guaranteed by the Constitution."

Further, at page 720, the Court stated:

> "The terms 'public use' and 'public purpose' have never been defined with precision, and cannot be. Lo-

calities, customs and times change, and with them the needs of the public may change. But even the most liberal courts have put boundaries upon the meanings. One eminent authority sums up the matter by saying that the courts which go furthest in sustaining the power of eminent domain hold that 'anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor' constitutes a public use. We think so unqualified a definition cannot be sustained, because every factory or mercantile house of any size meets that definition to some degree, and most certainly the government has not an unrestricted power to seize one man's property and sell it to another for the building of a factory or a store. The decisions of the courts which used such sweeping language and which are cited to us fall far short of supporting the contention made to us in the present case. We shall discuss them in a moment."

The *Schneider* decision, *supra*, sets forth the basic requirements relating to the taking of a specific piece of private property. At page 718, the court confirms the fact that the question of whether or not such taking is necessary for a certain public use or purpose is initially and almost wholly a legislative question, but nevertheless subject to the Constitution. Congress itself could not deprive a person of his property without due process of law. In this leading case, the Court pointed out that Congress made no declaration concerning the specific property involved. Its declaration concerned "conditions existing in the District of Columbia with respect to substandard housing and blighted areas." Obviously, that declaration did not concern all conditions everywhere in the District. It means certain conditions in certain places. When Congress "conferred the power of

eminent domain upon the Agency, it did so subject to the 'conditions' of the Act and 'for that purpose,' *i.e.*, for the redevelopment of 'blighted territory' and the prevention and elimination of 'blighting factors or causes of blight.' "

Thus, the delegation of authority to the Agency to determine what properties should be seized is subject to the required tests established long ago.

While the California system is differently structured than was the District of Columbia Redevelopment Land Agency, the constitutional limitations and requirements remain the same.

The Huntington Park Redevelopment Agency was formed by the legislature of the City of Huntington Park as a political subdivision of the State of California pursuant to the provisions of the California Health & Safety Code which, by Section 33391 of said Code, granted the power of eminent domain for public redevelopment purposes. Both the legislature of the City, *i.e.*, the city council, and the legislature of the Agency, namely, the Board were one and the same individuals.

Thus, under this "system," the Redevelopment Agency is both a legislative and an executive branch.

When the Huntington Park Industrial Redevelopment Project was adopted in 1977, it was by action of both the City Council and the Redevelopment Agency sitting in joint public session. Each member of the City Council is also a member of the Agency Board, which makes such joint meetings convenient but confusing.

On January 21, 1980, the Board of the Redevelopment Agency adopted a resolution declaring that public interest and necessity require the acquisition by the Agency of certain (Duncan) real property in fee for redevelopment purposes. The resolution further recites that the public interest and necessity require the project, that the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and,

lastly, that the Duncan property is necessary for the project.

These recitals, for which the Agency claims conclusive presumptions, in effect declare that the public interest and necessity require that the Agency acquire the Duncan property for the Spitzers at the Spitzers' expense so that they may expand their existing business by erecting building additions which will house their private business enterprise; further, that this expansion onto neighboring private property is most compatible with the greatest public good and the least private injury, *i.e.*, (Duncan is the only private person affected) and finally, that the Duncan property is necessary for the Spitzer Project.

If the Fifth Amendment doesn't provide a private property owner with "important protection against abuse of the power of eminent domain" in this fact situation because of statutory conclusive presumptions, then the constitutional mandate that there be a judicial determination of the validity of that legislative decision is without meaning.

The seizure of title to real estate upon which slums exist or upon which a slum may be foreseen (in this case blight) would be valid under the Constitution only to the extent that the taking is reasonably necessary to the accomplishment of the asserted public purpose.

The state legislature is totally lacking in power to abrogate or limit constitutional rights of any person.

While the redevelopment agency may be vested with some discretion, it cannot under any circumstances be equated with constitutional mandates.

The decision of the California Court of Appeal concludes that Duncan failed to demonstrate a lack of substantial evidence to support the Agency findings in the Resolution of Necessity and declares that, "The Agency's selection of the Spitzers' proposal was well within the bounds of discretion and was based on factors consistent with the Agency's mandate to 'prevent the spread of blight and deterioration.' "

This controversy between the private property owner and his neighbor into which the Redevelopment Agency of Huntington Park has intervened, or more likely instigated, has resulted in this constitutional dilemma.

The Agency first agrees in writing with the Spitzers to use its power of eminent domain to acquire 13,425 square feet of the Duncan property for the private use by the Spitzers at their sole expense and has accepted approximately $7,000 on account for the rental of this power. Then, after having notified Duncan of his empty right to oppose the anticipated resolution of necessity, the Agency proclaims the taking to have a public purpose, overrules Duncan's objection and invokes the power of the state court system to acquire Duncan's property, to the end that Spitzers will build a bigger improvement than that contemplated by Duncan and thereby the public purpose is served and the use of the power of eminent domain is constitutionally supported.

This record reflects a total conflict between the judgment of the trial court and the decision of the Court of Appeal. The trial court found on the basis of the evidence that the taking of the Duncan property by the Agency for the Spitzers did not constitute a public purpose and made findings to this effect. The California Court of Appeal disregarded not only the trial court's findings but the contentions of both the Agency and the property owner on appeal and proceeded to search the record for support of its contrary conclusion.

Said appellate court then stated that the law required the property owner to sustain the burden of proving the lack of substantial evidence to support the Resolution (of necessity), and then concluded that since there existed substantial (some) evidence to support the Resolution, the judgment of the trial court must be reversed.

The opinion of the California Court of Appeal states as follows with respect to the scope of Court Review of the Resolution of Necessity:

"The Agency's authorization to file an action in eminent domain is dependent on the passage of a valid resolution of necessity which finds that:

'(a) The public interest and necessity require the project.

'(b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

'(c) The property sought to be acquired is necessary for the project.' (Code Civ. Proc., §§ 1240.030, 1240.040.)

The Resolution of Necessity is 'an administrative determination' that these statutory prerequisites have been met for the taking of particular property. (Law Rev. Committee Comment to Code Civ. Proc., § 1245.230 (1975 Add.).)

Once the resolution has been adopted, it conclusively establishes its findings (Code Civ. Proc., § 1245.250) and eminent domain proceedings may be instituted.

The Legislature relieved the harshness of ths rule by enacting Code of Civil Procedure section 1245.255 which permits a 'person having an interest in the property described in a resolution of necessity' to collaterally attack its conclusive effect '(1) [b]efore the commencement of the eminent domain proceeding by petition for a writ of mandate pursuant to [Code of Civil Procedure] Section 1085 . . . . [or] (2) [a]fter the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.'

Section 1245.255, subdivision (b), further provides:

'A resolution of necessity does not have the [conclusive] effect . . . to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.'

The Legislative Committee comment to the section unequivocally states that 'the scope of the court's re-

> view under this section is limited to a determination of whether the resolution is supported by substantial evidence.' "

This "administrative" or legislative limitation is not entitled to any local statutory presumptions whatsoever in determining the applicable constitutional limitations on such power.

In the case of *People v. Chevalier* (1959) 52 Cal. 2d 299, 340 P.2d 598, the Court stated that the only limitations placed on the exercise of the right of eminent domain by the California Constitution and the United States Constitution Fourteenth Amendment are that the taking be for a public use and that just compensation be paid. Each of these is a justiciable issue. All other questions are legislative.

Any justiciable issue is one that becomes triable in a court of general jurisdiction. The California Superior Court (a court of general jurisdiction and the trial court in this case) is not limited to a determination as to whether or not there is any evidence to support the Agency's conclusion as to public use, but rather has the obligation to receive evidence and to make its own determination on such issue, just as it would be required to make a determination on the issue of just compensation.

The Redevelopment Agencies in California have demonstrated their willingness to ignore anything except what they conceive as a means to build a local empire of property and power. The time has come to stop the public use concept from becoming a blank check for the local Redevelopment Agencies to use without regard to any constitutional limitations whatsoever.

Even the procedures employed by the Agency in this case are repressive and lack basic fairness.

Petitioner Duncan had no inkling that his property was being considered for any development by the Agency or otherwise until he received a letter from an appraiser dated July 25, 1979. Even after direct inquiry to the Agency,

Duncan was not advised as to any information concerning any redevelopment plan. Duncan was given a period of two weeks to submit a plan for the further development of his property, without even a hint as to what the Agency or his neighbor had in mind. The Spitzers' plan for the development of all or a part of the Duncan property was a secret as between the Spitzers and the Agency. Duncan did not receive even basic consideration of fairness in regard to his property.

Even the procedures used by the Agency were a denial of procedural due process, which is an independent constitutional reason for reversal of this Court of Appeal decision.

Trial of the condemnation action is presently set for October 25, 1983, in the Los Angeles Superior Court. A stay of these proceedings is respectfully requested pending hearing on this petition.

CONCLUSION.

This is obviously the end of the procedural line for petitioner Duncan. The value of the property in question is relatively small, but the principle is pervading.

If certiorari is not granted, Duncan must accept an award of the market value of what formerly was his private property, and the Fifth and Fourteenth Amendments can be returned to the shelf as items of historical interest.

Respectfully submitted,

BRUCE E. CLARK,

Attorney for Petitioner.

APPENDIX "A".

Judgment After Trial by Court.

Superior Court of the State of California, County of Los Angeles.

Huntington Park Redevelopment Agency, a body politic, Plaintiff, vs. David Duncan, et al., Defendants. No. C 318 715.

Filed: January 5, 1981.

This cause came on regularly for trial before the above-entitled Court on November 4, 1980, the Honorable Lester E. Olson, Judge presiding, without a jury, in Department 31, Michael B. Montgomery by Steven N. Skolnik appearing as attorney for plaintiff and Bruce E. Clark appearing as attorney for defendants David Duncan and Marilyn F. Duncan, and evidence, both oral and documentary, having been presented by both parties and the cause having been argued and submitted for decision, and Findings of Fact and Conclusions of Law having been signed by the Court:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Agency is not entitled to take the real property of defendants David Duncan and Marilyn F. Duncan in this action, and plaintiff's complaint is hereby dismissed.

IT IS FUTHER ORDERED ADJUDGED AND DECREED that defendants David Duncan and Marilyn F. Duncan recover judgment against plaintiff for litigation fees and expenses in the sum of $_____ .

Dated: Jan. 5, 1981.

/s/ Lester E. Olson
LESTER E. OLSON
Judge of the Superior Court

APPENDIX "B".

Findings of Fact and Conclusions of Law.

Superior Court of the State of California, County of Los Angeles.

Huntington Park Redevelopment Agency, a body politic, Plaintiff, vs. David Duncan, et al., Defendants. No. C 318 715.

Filed: January 5, 1981.

This cause came on regularly for trial before the above-entitled Court on November 4, 1980, the Honorable Lester E. Olson, Judge presiding, without a jury, in Department 31, Michael B. Montgomery by Steven N. Skolnik appearing as attorney for plaintiff and Bruce E. Clark appearing as attorney for defendants David Duncan and Marilyn Duncan.

Said cause having been heard, evidence both oral and documentary having been introduced, and said cause having been submitted for decision, the Court having rendered its Notice of Intended Decision on November 12, 1980, and counsel for plaintiff having made a written Request for Findings of Fact and Conclusions of Law, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is now and at all times mentioned herein was a body politic and corporate, existing under the laws of the State of California.

2. Defendants David Duncan and Marilyn F. Duncan are now and at all times mentioned herein were the owners in fee of a parcel of real property located in the City of Huntington Park, County of Los Angeles, State of California, and which is situate within the geographical boundaries of the Redevelopment Agency's Huntington Park Industrial

Redevelopment Project, which real property is commonly known as Assessor's Parcel 6321-2-7.

3. Plaintiff sought by this action to acquire a rectangular portion of the parcel owned by said defendants David Duncan and Marilyn F. Duncan, being that portion of said parcel which is located at the corner of Regent Street and Laura Avenue, with frontage on Regent Street of 75 feet and frontage on Laura Avenue of 179.04 feet.

4. On May 25, 1977, a General Plan for the Huntington Park Industrial Redevelopment Project was adopted by the City Council of the City of Huntington Park, California, being Ordinance No. 167-NS, which said General Plan has not been amended since its adoption.

5. From the date of the adoption of said General Plan on May 25, 1977, to the date of the filing of this action on April 4, 1980, no other condemnation actions were commenced within the Huntington Park Industrial Redevelopment Project, consisting of approximately 200 acres, nor did the Agency acquire by purchase any real property within said Industrial Redevelopment Project.

6. Said General Plan did not contemplate any change in street alignment, lot elevation or parcel size with respect to said defendants' real property.

7. At all times mentioned herein, up to and including April 4, 1980, said defendants' real property was not in violation of any existing building code provision and its improvements were not in need of rehabilitation and defendants were and are conducting a viable business at said location.

8. The Rules and Regulations for Owner Participation adopted by plaintiff Agency were adopted at the same time as the General Plan.

9. These Rules provided for a system whereby a property owner would be notified by certified mail when plaintiff Agency was considering acquisition of property within the Project, since clearing of the area by acquisition of all property within the Project boundaries was not contemplated.

10. The first indication to defendant property owners of any plan involving any of their property was a letter dated July 25, 1979, from an appraiser who had been retained by said Agency.

11. Notification to defendant property owners as required by the Rules for Owner Participation and the Plan was a certified mail letter dated August 21, 1979.

12. By letter dated September 14, 1979, defendant property owners submitted their signed written Statement of Interest in Participating on the form specified by the Agency's Rules.

13. In response to their Request for Owner Participation, defendant property owners received a letter from the Agency dated October 1, 1979, which requested more detail as to the property owners' plan but declined to disclose any specific plan contemplated by said Agency until a public meeting on October 17, 1979.

14. At said meeting of October 17, 1979, an Owner Participation Agreement between plaintiff Agency and the owners of adjacent property was presented and considered.

15. At the same meeting, a proposal by said property owners to construct an improvement 63 feet wide by 140 feet long on said property was presented.

16. At a meeting conducted on October 29, 1979, the Agency by its Board approved and authorized the execution of an Owner Participation Agreement between said Agency and Spitzers, the adjacent property owners, without making any offer or proposal to the defendant property owners for

owner participation, in violation of the Rules adopted by said Agency for owner participation.

17. The adoption of the Resolution of Necessity on January 21, 1980, purporting to authorize the taking of a portion of said defendants' real property did not have the conclusive effect prescribed in C.C.P. Section 1245.250 because its adoption was influenced or affected by a gross abuse of discretion by the governing body.

18. The public interest and necessity do not require the project for which this action was commenced.

19. The project for which this action was commenced is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

20. The property sought to be acquired in this action is not necessary for the Huntington Park Industrial Redevelopment Project, except as to improvement by defendants pursuant to owner participation under said project.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. To the extent any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein in full.

2. Plaintiff Agency is not entitled to take said defendants' real property in this action and said defendants are entitled to a dismissal of plaintiff's complaint.

3. Said defendant property owners are entitled to recover from plaintiff litigation fees and expenses as defined in California Code of Civil Procedure, Section 1235.140.

Judgment is hereby ordered to be entered accordingly.
Dated: Jan. 5, 1981.

/s/ Lester E. Olson
LESTER E. OLSON
Judge of the Superior Court

APPENDIX "C".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Huntington Park Redevelopment Agency, etc., Plaintiff and Appellant, v. David Duncan, et al., Defendants and Respondents. 2d Civ. No. 65177. (Super.Ct.No. C 318 715).

Filed: March 22, 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Judge. Reversed.

Michael B. Montgomery, Agency Attorney, and Steven N. Skolnik, Special Counsel, for Plaintiff and Appellant.

Bruce E. Clark, for Defendants and Respondents.

The Huntington Park Redevelopment Agency (hereinafter "Agency") appeals from a judgment dismissing its eminent domain proceedings against the owners of a parcel of real property within its redevelopment area after legal issue trial on the question of whether the property was subject to condemnation.

Evidence at the trial established that defendants, David and Marilyn F. Duncan, are the owners of a parcel of real property located within the boundaries of an area designated as the Huntington Park Industrial Redevelopment Project (hereinafter "Project").[1] The Duncans own and operate a wholesale industrial bolt supply business on a portion of the property. The other portion of the property is used as a parking lot by their month-to-month tenant. Frank and Erlys Spitzer own property adjoining the Duncan property where they currently operate a manufacturing business. The Spit-

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[1]The project was adopted by the City of Huntington Park in 1977 pursuant to the California Community Redevelopment Law. (Health & Saf. Code, § 33000 et seq.)

zers submitted a proposal to expand their business onto that portion of the Duncan property which is used as a parking lot ("the parcel").

By letter dated August 21, 1979, the Agency officially notified the Duncans that it was "considering the acquisition" of the parcel and that discussions with the Spitzers "have recently revealed that the project may be feasible and that the Redevelopment Agency may pursue an Owner's Participation Agreement with them. . . ."

On September 14, 1979, defendants submitted to the Agency a "Statement of Interest in Participating," summarily indicating their plan to improve the parcel with a machine shop "to fabricate metal to customers' requirements." In a letter dated October 1, 1979, James Funk, Executive Director of the Agency, acknowledged receipt of the Duncans' "Statement of Interest" and requested more details regarding the Duncans' proposed use of the subject property, including the "floor area of the proposed building, the location of the buildings on the parcel, the proposed schedule of construction, and [their] willingness to enter into an owner participation agreement with the Redevelopment Agency that would guarantee completion of the project within two years." By this letter, the Duncans were informed that all proposals would be released at a scheduled public meeting.

On October 17, 1979, the Agency held its first public meeting to consider proposals for development of the parcel. It was attended by the Duncans, the Spitzers, their respective counsel, and Agency members. At the meeting, the details of the Spitzer plan were disclosed. The Spitzers proposed to expand their manufacturing business by erecting a 10,800 square foot industrial structure with a market value of "at least $108,000." The Spitzers made a commitment to com-

plete the development and construction of the project within a year.

At that meeting, the Duncans also submitted a detailed version of their construction plan to the Agency. The Duncans proposed to construct a 8,820 square foot metal machine shop. The proposal estimated construction costs of $87,628 but did not give a time estimate for completion of construction.

The meeting was adjourned until October 29, 1979, and an expert consultant was retained to analyze the competing plans. During the interval, counsel for the Duncans spoke with the consultant who "encouraged" the Duncans "to call him." During this period, the Duncans also obtained a copy of the Spitzer plan.

Prior to the October 29, 1979 meeting, the consultant submitted a report to the Agency which analyzed the two proposals and recommended acceptance of the Spitzers' proposal, as that project would "be of higher intensity and of greater value relative to the size of the parcel than the development proposed by the [Duncans]." The report noted that the Spitzer proposal would provide 35 jobs and would raise the annual sales of the Spitzer company by $2,000,000, an increase of 100 percent. The Spitzer plan would also result in a tax increment to the Agency of $1,080 per year. In contrast, the consultant concluded that the Duncan plan would result in only eight assured new jobs and a tax increment of $880.

The report also concluded that the Duncans' proposed construction could be adequately accommodated on the remaining property owned by the Duncans. The report further noted that the Spitzers had made a commitment to complete the project within a year while the Duncans had "declined to commit to a definitive construction schedule."

It appears that counsel for the Duncans received the expert's report at the October 29 meeting.[2]

At this hearing, Duncan would not commit himself to a definite starting date. According to Duncan's own testimony, Agency members asked him "when [he] could start construction. They wanted a definite [starting] date . . . and [he] said, 'I would need a little time to think it over' and that was the end of the conversation."[3] At the conclusion of the hearing, the Agency approved the Spitzer proposal.

Duncan refused the Agency's offer to purchase the property. At a public meeting, held January 21, 1980, the Agency passed "A RESOLUTION . . . FINDING AND DETERMINING THAT THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY REQUIRE THE ACQUISITION OF CERTAIN REAL PROPERTY FOR PUBLIC PURPOSES," which is a prerequisite for the initiation of eminent domain proceedings. (Code of Civ. Proc., § 1245.220.) At that hearing, the Duncans objected to the adoption of the resolution. The Agency found, inter alia:

> "(1) The public interest and necessity require the proposed project: and
>
> "(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
>
> "(3) The property . . . is necessary for the proposed project."

---

[2]When counsel for Duncan was asked whether he received a copy of the consultant's report at that time, he replied, "I believe I did," and further indicated that he responded at the hearing to the primary differences noted in the report.

[3]The testimony of Duncan's counsel that he "indicated" at the hearing that Duncan would build the building within a one-year time frame does not create any substantial conflict with Duncan's clear admission, which was in accord with the testimony of the Administrative Director of the Agency.

Pursuant to the adoption of the Resolution of Necessity, the Agency filed its complaint in eminent domain against the Duncans to acquire the parcel. As a defense,[4] the Duncans urged that the Agency abused its discretion in adopting the Resolution of Necessity specifying the Agency's refusal to give proper consideration to their request for owner participation. The Duncans further urged that the Agency made an agreement to allow the Spitzers to develop the property, prior to notifying the Duncans that the taking of the parcel was under consideration.

At trial, defendants did not present a complete record of the proceedings of October 17, 1979, October 29, 1979, or January 21, 1980. Rather, some of the parties who were present at the proceedings on October 17 and October 29 testified as to their recollection of the proceedings as recited above. There was no evidence of the proceedings of January 21, 1980. All of the documents referred to above, including the two competing proposals and the independent consultant's report, were received in evidence pursuant to stipulation of counsel.

Based on the foregoing, the trial court concluded that the Agency was "not entitled to take the real property of defendants" and in its Findings of Fact and Conclusions of Law, the court determined:

> "17. The adoption of the Resolution of Necessity on January 21, 1980, purporting to authorize the taking of a portion of said defendants' real property did not have the conclusive effect prescribed in C.C.P. Section 1245.250 because its adoption was influenced or affected by a gross abuse of discretion by the governing body.

---

[4]See, Code of Civil Procedure, section 1245.255, subdivison (a)(2).

"18. The public interest and necessity do not require the project for which this action was commenced.

"19. The project for which this action was commenced is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

"20. The property sought to be acquired in this action is not necessary for the Huntington Park Industrial Redevelopment Project, except as to improvement by defendants pursuant to owner participation under said project."

The trial court dismissed the complaint and this appeal followed.

Contentions

Appellant contends that the trial court erred in dismissing the eminent domain complaint in that: (1) the Agency did not abuse its discretion in adopting the Resolution of Necessity; (2) the judgment is not supported by substantial evidence, as respondents failed to sustain their burden of showing that the requirements for issuance of the Resolution were not met; (3) the alleged denial of owner participation rights does not constitute an independent defense to the right to take in an eminent domain action; and (4) the alleged abuse of discretion in enacting the Resolution does not constitute an independent defense to eminent domain.

Respondents contend the order of dismissal was proper in that: (1) the Agency abused its discretion by its failure to apply a standard of resonableness and good faith in its owner participation decision; (2) the denial of statutorily mandated owner participation constitutes a violation of the constitutional rights of property owners; and (3) the proposal selected violates the space limitation requirements of the Redevelopment Plan.

Discussion

Summary

The proper scope of the trial court's inquiry was limited to the question of whether the Agency committed a gross abuse of discretion in adopting the Resolution of Necessity. To show gross abuse of discretion, defendants were required to sustain their burden of proving the lack of substantial evidence to support the Resolution. Defendants' status as owners desiring participation did not preclude Agency from exercising its discretion to take defendants' property. The reconstructed record of the Agency proceedings presented at trial demonstrates the existence of substantial evidence to support the Resolution and therefore the judgment must be reversed.

Proper Scope of Court Review Is Limited to Determination of Whether Agency Committed Gross Abuse of Discretion in Adopting Resolution of Necessity

The Agency's authorization to file an action in eminent domain is dependent on the passage of a valid resolution of necessity which finds that:

> "(a) The public interest and necessity require the project.
>
> "(b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
>
> "(c) The property sought to be acquired is necessary for the project." (Code Civ. Proc., §§ 1240.030, 1240.040.)

The Resolution of Necessity is "an administrative determination" that these statutory prerequisites have been met for the taking of particular property. (Law Rev. Committee Comment to Code Civ. Proc., § 1245.230 (1975 Add.).)

Once the resolution has been adopted, it conclusively establishes its findings (Code Civ. Proc., § 1245.250) and eminent domain proceedings may be instituted.

The Legislature relieved the harshness of this rule by enacting Code of Civil Procedure section 1245.255 which permits a "person having an interest in the property described in a resolution of necessity" to collaterally attack its conclusive effect "(1) [b]efore the commencement of the eminent domain proceeding by petition for a writ of mandate pursuant to [Code of Civil Procedure] Section 1085 . . . . [or] (2) [a]fter the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title."

Section 1245.255, subdivision (b), further provides:

> "A resolution of necessity does not have the [conclusive] effect . . . to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body."

The Legislative Committee comment to the section unequivocally states that "the scope of the court's review under this section is limited to a determination of whether the resolution is supported by substantial evidence."

The burden of showing such lack of substantial evidence necessarily falls on the party challenging the resolution. It is well-settled in mandamus proceedings (Code of Civ. Proc., § 1085) that the party seeking review "must make some showing that the body invested with discretion has acted arbitrarily, capriciously, fraudulently, or without due regard for his rights and that the action was prejudicial to him. [Citations.]" (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.3d 180, 187; see also, *Ward v. County of Riverside* (1969) 273 Cal.App.2d 353, 357; *Dave's Market, Inc. v. Dept. Alcoholic Beverage Control* (1963) 222 Cal.App.2d 671, 677.)

Similarly, in administrative mandamus proceedings (Code Civ. Proc., § 1094.5), which are analogous to the review sought in the present case, the burden is on the challenging party " 'to demonstrate wherein the proceedings were unfair, . . . or showed "prejudicial abuse of discretion." It is the responsibility of the petitioner to make available to the court an adequate record of the administrative proceedings; if he fails to do this the presumption of regularity will prevail. [Citation.]. . . .' " (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691.)

Defendants' election to challenge the validity of the resolution by a defense to an eminent domain proceeding (Code Civ. Proc., § 1245.255, subd. (2)), rather than by an independent petition for writ of mandate (Code Civ. Proc., § 1245.255, subd. (1)), is a procedural matter only and provides no basis for shifting the burden of proof, or relaxing the requirement that the challenging party produce an adequate record.

Resolution Supported by Substantial Evidence

Appellant's contention that the Duncans failed to sustain their burden of proving that the Agency abused its discretion in adopting the resolution is meritorious and requires reversal of the judgment.

The Duncans did not present a full record of any of the administrative proceedings which it requested the trial court to review. On the basis of the evidence of the hearings, which were reconstructed through testimony and documents presented at trial, we conclude that the Duncans failed to demonstrate a lack of substantial evidence to support the Agency findings in the Resolution of Necessity. Rather, the Agency's selection of the Spitzers' proposal was well within the bounds of discretion and was based on factors consistent with the Agency's mandate to "prevent the spread of blight and deterioration."

Prior to the Agency's decision, the Spitzers openly committed themselves to a definite time frame for completion of the facility, while the defendant would not. Consideration of this factor is certainly consistent with the aims of the Agency.

Moreover, the Spitzer building would provide a greater tax increment to the Agency and would provide 35 new jobs, while defendants' plan would assure only 8 new jobs. The Spitzer proposal would add $2,000,000 to the area's gross revenue; no showing of a comparable enhancement of productivity was made by the Duncans.

Defendants' contention, that the Agency's decision to select the Spitzers' proposal violated the statutes and regulations regarding owner participation, is without merit. Defendants' status as owners desiring participation in the project did not preclude the Agency from exercising its discretion to take defendants' property. An owner of a particular parcel does not have an absolute right to develop that parcel.

In this regard, Health and Safety Code section 33339 provides:

> "Every redevelopment plan shall provide for participation in the redevelopment of property in the *project area* by the *owners of all or part of such property* if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area." (Emphasis added.)

In intepreting the predecessor statute to Health and Safety Code section 33339, our Supreme Court noted:

> "That there is no absolute right of owner participation in the redevelopment of each separately owned parcel of land within the project area is apparent from the provisions of section 33701 [now 33339] itself in

> that it provides that as a condition thereof an owner desiring to participate must agree 'to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area.' " (*In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 59-60; see also, *Sanguiuetti v. City Council* (1965) 231 Cal.App.2d 813, 825.)

Rather, in exercising its eminent domain powers to acquire property of owners desiring participation, the Agency has a "duty of reasonableness and good faith" and is required only to "act fairly and without discrimination." (*Fellom v. Redevelopment Agency* (1958) 157 Cal.App.2d 243, 250.)

The Agency Rules governing owner participation in the Huntington Park Redevelopment Project only require the Agency to:

> "[E]xtend preferences to persons who are *owners* and business tenants in *the Project area*, to continue in or, if the Agency acquires the land of an owner or the land on which a business tenant is located, to re-enter the Project area if any such owner or tenant otherwise meets the requirements prescribed in the Redevelopment Plan and in these Rules." (Emphasis added.)

No special status is accorded owners of particular parcels. The Spitzers and the Duncans have equal preference status under this provision.

The Agency did not violate its duty of reasonableness and good faith by selecting the proposal of a competing owner participant, over the Duncans, especially in view of the significant advantages of the Spitzer proposal.

Finally, defendants contend that the Spitzer proposal exceeds the space requirements of the Redevelopment Plan, as the proposed construction would cover 80 percent of the

newly acquired parcel.[5] However, this contention overlooks the fact that the newly acquired parcel will be added to the parcel already owned by the Spitzers. The record does not show that the proposed construction would result in over 60 percent of the combined Spitzer property being covered by buildings.

In view of the required reversal, appellant's remaining contentions do not require discussion.

The judgment is reversed, and the cause is remanded with directions to the trial court to enter an order overruling the Duncans' objection to the right to take.

POTTER, Acting P.J.

We concur:

LUI, J.

DANIELSON, J.

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[5]Section 402 of the Redevelopment Plan states: ". . . [T]he amount of land which may be covered by buildings shall not exceed sixty percent (60%) for new construction . . . ."

APPENDIX "D".

Certification of Opinion for Publication and Modification of Opinion on Denial of Rehearing.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Huntington Park Redevelopment Agency, etc., Plaintiff and Appellant, v. David Duncan, et al., Defendants and Respondents. 2d Civ. No. 65177. (Super.Ct.No. C 318 715).

Upon further consideration, it appearing to a majority of this court that the opinion filed herein on March 22, 1983, meets the standard for publication specified in Rule 976(b)(2), California Rules of Court, it is hereby ordered that said opinion, as modified by this order, be published in the Official Reports.

The opinion in the above entitled case is modified as follows:

1. On page 7, third line, delete the comma after the word "property."

The opinion having been so modified, the petition of Respondents for rehearing, filed April 6, 1983, and the answer thereto, filed April 14, 1983, have been read and considered, and the petition is denied.

APPENDIX "E".

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

May 18, 1983.

I have this day filed Order HEARING DENIED.

In re: 2d Civ. *No.* 65177 HUNTINGTON PARK DEVELOPMENT AGENCY *vs.* DAVID DUNCAN, et al.

Respectfully
Clerk

Office Supreme Court, U.S.
FILED
SEP 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-309

IN THE

Supreme Court of the United States

October Term, 1983

DAVID DUNCAN,

Petitioner,

vs.

HUNTINGTON PARK REDEVELOPMENT AGENCY, a Body Politic,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the United States.

MICHAEL B. MONTGOMERY,
STEVEN N. SKOLNIK,
3250 Ocean Park Blvd.,
Suite 100,
Santa Monica, Calif. 90405,
(213) 450-5288,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the United States.

Statement of the Case.

Respondent desires to amplify and rectify Petitioner's "Statement of the Case", so that the Court may have all relevant facts before it:

1. Petitioner has advised the Court that the subject action was the only redevelopment activity which occurred during the first three years following the adoption of the Huntington Park Industrial Redevelopment Project. To the contrary, Respondent during that period entered into contracts which resulted in many millions of dollars of redevelopment activity, covering many acres, consisting primarily of a new industrial park. The subject action resulted from the first filed eminent domain proceeding. Others have followed. Respondent offers these facts because Petitioner

implies that Respondent has discriminated against him.

2. The trial Court did not find, as Petitioner states, that the taking "was not for a *public purpose*" (emphasis added), but made a finding that there was no *public necessity* for the taking of Petitioner's property.

ARGUMENT.

Petitioner's "Questions Presented for Review" do not logically relate to his "Reasons for Granting the Writ". While the former presents due process questions, almost the whole of the latter argues that the intended use is not a public use and deals not at all with the due process questions.

Petitioner raises the "public use" issue, for the first time, in his petition to this Court. All evidence and argument has pertained solely to the issue of whether Respondent's actions in implementing procedures to attempt to acquire Petitioner's property constituted a gross abuse of discretion.

Petitioner presented no evidence at trial regarding public use or public necessity. Plaintiff presented the only evidence before the Court on public use or necessity. That evidence demonstrated that the project would produce many public benefits, and that the project was necessary to the public.

The trial Court did find that public necessity did not require the proposed project, as indicated at page 5 in Appendix "A" to the Petition. The only evidence on the subject at trial was directly contradictory. All of Petitioner's evidence at trial expounded the argument that Respondent's procedures constituted a gross abuse of discretion.

One of Respondent's grounds for appeal was that the trial Court's finding regarding lack of public necessity was unsupported by any evidence. The Court of Appeal did not address this ground. Instead, it reversed the trial Court on due process grounds, ruling on the principal issue at trial, which issue, couched in slightly different language, is the issue contained in Petitioner's "Questions Presented for Review" before this Court.

Petitioner provides this Court with a wealth of general "public use" verbiage, none of which pertains to due process, and none of which demonstrates that the subject taking

is not for a public purpose. While the petition stops short of making the statement literally, the clear inference is the view that if California law permits this taking, California law violates the United States Constitution. Upholding both the public nature of the taking and the constitutionality of the applicable law is the case of *Redevelopment Agency, etc. v. Hayes*, 122 Cal.App.2d 777, cert. den. 75 S.Ct. 214, 266 P.2d 105,

> "The claim that the Redevelopment Acts because they provide for acquisition of property by eminent domain and its later resale, violate the Fourteenth Amendment to the Constitution in denying to the property owners the equal protection of the law, has been denied in several cases, among others, *Ajootian v. Providence Redevelopment Agency*, supra, 91 A.2d 21; *Nashville Housing Authority v. City of Nashville*, supra, 237 S.W.2d 946; *Belousky v. Redevelopment Authority*, supra, 54 A.2d 277; *Robinette v. Chicago Land Clearance Commission*, D.C. Ill. 1951, 115 F. Supp. 669; . . . . While the decision in the *Robinette* case is merely a 'Memorandum' and is unpublished, it is of value for the reason that in *Robinette v. Campbell*, 342 U.S. 940, 72 S.Ct. 563, 96 L.Ed. 699, the Supreme Court denied motions for leave to file petitions for writ of mandamus to compel the trial judge to expunge his order of dismissal. As said in *Waddell v. Chicago Land Clearance Commission*, supra, 206 F.2d 748, at page 750, where the same federal questions were raised: 'Thus it is seen that the Supreme Court has refused to entertain an application to review the questions which appellants have attempted to present by this action.' As pointed out in those cases, the acquiring of the property is for a public use, its sale and transfer of the property from one individual to another, so far as it may occur, are merely incidental to that use. . . .

> The act does not violate the due process clause of the Fourteenth Amendment to the Federal Constitution. . . ."

Petitioner's argument is at its core the old argument that because Respondent intends to convey the acquired property to a private party, the project has no public purpose.

The small portion of the petition which pertains specifically to aspects of the procedure also is not persuasive. Petitioner's statement, at page 9 of the petition, that Respondent agreed in writing to acquire Petitioner's property prior to informing Petitioner of his right to oppose the acquisition, is not sustained. (Please see evidence at trial recited in the Court of Appeal's Opinion at pages 8 and 9 of Appendix "C" to the Petition.) The evidence is also that:

1. Beginning in 1977 Respondent gave Petitioner the opportunity to indicate an interest in participating in the redevelopment program. Petitioner never indicated any interest in doing so until the commencement of these proceedings.

2. Respondent selected the proposed project and agreed to proceed after weighing the merits of the proposed project versus the alternative project proposed by Petitioner. Respondent based its decision on the analysis of an expert consultant retained to compare the relative public benefits of the two proposals, who found substantially greater public benefit in the project selected.

3. Petitioner was represented by counsel at all phases of these proceedings.

4. The consultant's analysis found that Petitioner's proposed project could still be completed on Petitioner's remaining land after this taking.

Respondent was afforded adequate procedural opportunities. Petitioner's argument always has been in essence that

it was illegal for Respondent to select another project as long as Petitioner, the owner, had any competing proposal. This contention was rejected by the Court of Appeal in its ruling that Respondent's conduct satisfied due process requirements.

Petitioner has not provided this Court with any reason justifying this Court's review of this case. The Court of Appeal decision is not in conflict with any other decision, and has the implied approval of a Unanimous State Supreme Court. Similarly, this case is of limited importance, in that these disputes are rare (there are no other Appellate opinions on the subject Code Section.) When disputes occur they turn on the specific facts involved and not on general law.

In conclusion, the additional reason for which this Court should deny the petition is that, as demonstrated by all the material submitted, the unanimous decision by the Court of Appeal was correct and not in violation of the U.S. Constitution.

Respectfully submitted,

MICHAEL B. MONTGOMERY,
STEVEN N. SKOLNIK,
Attorneys for Respondent.